No. 85-1425 (3)

Supreme Court, U.S.
FILED
MAR 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

REPUBLICAN PARTY OF HAWAII, TORAKI MATSUMOTO, AND RUDY PACARRO,

Appellants,

v.

PATSY MINK, MARILYN BORNHORST, AND RAYMOND K. PUA, CITY CLERK, CITY AND COUNTY OF HONOLULU,

Appellees.

On Appeal From The Supreme Court Of Hawaii

BRIEF OF THE STATE OF HAWAII AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES MINK AND BORNHORST

JAMES H. DANNENBERG
First Deputy
Attorney General
Counsel of Record

CORINNE K.A. WATANABE
Attorney General
State of Hawaii

STEVEN S. MICHAELS
Deputy Attorney General
State of Hawaii

State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Counsel for the
State of Hawaii

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

26/86

QUESTIONS PRESENTED

1. Whether any substantial federal question is presented by a local ordinance that renders an elected official who is duly recalled by a majority of the voters ineligible to run in the special election to fill the vacancy created by the majority's decision?

2. Whether the filing of a timely post-judgment motion to amend a state court judgment to provide substantial new rights to one of the parties and a subsequent modification of the judgment granting the relief requested requires the filing of a new notice of appeal to perfect jurisdiction in this Court under 28 U.S.C. § 1257(2) (1982)?

3. Whether claims that city councilmen, recalled from office by a majority of the voters after having switched political parties during their terms of office, have been unconsitutionally denied an opportunity to run in a special election to fill the vacancies created by the recall are justiciable when:

(a) the councilmen were never previously recalled;

(b) the councilmen have given no indication that they desire to switch parties again in the middle of their terms;

(c) the special election has been held; and

(d) the political party from which the councilmen defected would be entitled to fill vacancies by appointment if the special election results were invalidated;

4. Whether claims that the manner in which the highest court of a state disposed of a petition for mandamus violated the Constitution

(a) have been forfeited or otherwise not preserved for review in this Court when the claimant fails to invoke an available opportunity to present such procedural claims to the state court by means of a motion for reconsideration; and, if preserved for review,

(b) present a substantial federal question when the claimant was given full and fair notice of the relief sought, and an opportunity to litigate whether the relief should be granted, and the relief granted did not exceed that prayed for?

5. Whether an appeal from a state court judgment may be employed to obtain an advisory ruling from this Court as to the *res judicata* effect of the state court judgment in proceedings in the inferior federal courts?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

OPINION BELOW 4

JURISDICTION 5

STATEMENT OF THE CASE 5

ARGUMENT 9

I. The Appeal Presents No Substantial Federal Question 9

II. The Appeal is Riddled with Procedural Defects 12

CONCLUSION 16

TABLE OF AUTHORITIES

CASES: Page

Anderson v. Celebrezze, 460 U.S. 780 (1983) 10,11,16
Board of Regents v. New Left Educ. Project, 404 U.S. 541 (1972) 2
Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930) 12
Clements v. Fashing, 457 U.S. 957 (1982) 10
Engle v. Isaac, 456 U.S. 107 (1982) 12
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 2
F.C.C. v. League of Women Voters, 104 S. Ct. 3106 (1984) 5, 13
Firefighters v. Stotts, 104 S. Ct. 2576 (1984) 14
Flast v. Cohen, 392 U.S. 83 (1968) 16
F.T.C. v. Minneapolis-Honeywell Co., 344 U.S. 206 (1952) 12
Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) (per curiam) 13
Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321 (1984) 2
Heath v. Alabama, 106 S. Ct. 433 (1985) 15
Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1984) (per curiam) 13
Jefferson v. Abrams, 747 F.2d 94 (2d Cir. 1984) 14
Lynch v. Illinois State Board of Elections, 682 F.2d 93 (7th Cir. 1982) 9
Matsumoto v. Pua, No. 85-0950 (D. Hawaii filed August 12, 1985) 6, 7, 10
Matsumoto v. Pua, 775 F.2d 1396 (9th Cir. 1985) 7, 10, 16
Migra v. Warren City School Dist., 465 U.S. 75 (1984) 16
Mills v. Green, 159 U.S. 651 (1895) 13

Table of Authorities Continued

	Page
Mink v. Pua, 711 P.2d 723 (Hawaii 1985)	*passim*
Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam)	14
National Ass'n of Greeting Card Publishers v. United States Postal Serv., 462 U.S. 810 (1983)	14
Ohio Public Service Co. v. Ohio ex rel. Fritz, 274 U.S. 12 (1927)	12
Orr v. Orr, 440 U.S. 268 (1979)	15
Parsons Steel, Inc. v. First Alabama Bank, 106 S. Ct. 768 (1986)	16
Republican Party of Hawaii v. Mink, 106 S. Ct. 422 (1985) (Rehnquist, J., as Circuit Justice)	9
Republican Party of Hawaii v. Waihee, 709 P.2d 980 (Hawaii 1985)	4
Robinson v. Ariyoshi, 65 Hawaii 641, 658 P.2d 287 (1982)	15
Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982)	9
Silkwood v. Kerr-McGee Corp, 464 U.S. 238 (1984)	13
Socialist Workers Party v. Washington, 765 F.2d 1417 (9th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 783 (1986)	16
Weinstein v. Bradford, 423 U.S. 147 (1975) (per curiam)	14
CONSTITUTIONAL PROVISIONS:	
United States Constitution, First Amendment	12,15
United States Constitution, Fourteenth Amendment	15
STATUTES:	
28 U.S.C. § 1252 (1982)	13
28 U.S.C. § 1257(2) (1982)	2, 5

Table of Authorities Continued

	Page
28 U.S.C. § 1291 (1976)	13
28 U.S.C. § 2403(b) (1982)	1, 2
The Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959)	2
The Three-Judge Court Act of 1976, Pub. L. No. 94-381, 90 Stat. 1119 (1976)	2
Hawaii Rev. Stat. § 11-2 (1976)	4
Hawaii Rev. Stat. § 11-117(b) (Supp. 1984)	4
Hawaii Rev. Stat. § 11-118 (Supp. 1984)	8, 11
Act of June 7, 1955, ch. 225, 1955 Hawaii Sess. L. 200	2
Act of June 5, 1959, ch. 261, 1959 Hawaii Sess. L. 233	2
ORDINANCES:	
City and County of Honolulu Charter § 3-105(b) (1959), *reprinted in* Rev. L. Hawaii Appendix 8 at 994 (Supp. 1963)	3, 4
City and County of Honolulu Charter § 3-107 (1959), *reprinted in* Rev. L. Hawaii Appendix 8 at 995 (Supp. 1963)	3
City and County of Honolulu Charter § 12-113 (1959), *reprinted in* Rev. L. Hawaii Appendix 8 at 1023 (Supp. 1963)	3
City and County of Honolulu Charter § 11-102 (1972), *reprinted in* Rev. Stat. ch. 70 App. (Supp. 1974)	3
City and County of Honolulu Charter § 11-103 (1972), *reprinted in* Rev. Stat. ch. 70 App. (Supp. 1974)	3
COURT RULES:	
Sup. Ct. R. 15.1(a)	15
Sup. Ct. R. 28.4(c)	1

Table of Authorities Continued

	Page
Sup. Ct. R. 36.4	2
Hawaii R. App. P. 40 (1984)	5,9,13,15
LEGISLATIVE HISTORY:	
Hawaii Sen. Standing Comm. Rep. No. 696-55, *reprinted in* 1955 Hawaii Sen. J. 660	2
MISCELLANEOUS AUTHORITIES:	
Honolulu Star Bulletin & Advertiser (Sept. 29, 1985)	6
State of Hawaii Data Book (1985)	6
State of Hawaii, Results of Votes Cast: General Election, Tuesday, November 6, 1984 (1985)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1425

REPUBLICAN PARTY OF HAWAII, TORAKI MATSUMOTO, AND RUDY PACARRO,

Appellants,

v.

PATSY MINK, MARILYN BORNHORST, AND RAYMOND K. PUA, CITY CLERK, CITY AND COUNTY OF HONOLULU,

Appellees.

On Appeal From The Supreme Court Of Hawaii

BRIEF OF THE STATE OF HAWAII AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES MINK AND BORNHORST

INTEREST OF THE AMICUS CURIAE[1]

The State of Hawaii has an abiding interest in the processes of local government in our Fiftieth State.

---

[1] Although appellants note 28 U.S.C. § 2403(b) (1982) may be applicable, Juris. Stmnt. at v; Sup. Ct. R. 28.4(c), the State of

Nowhere is this more true than with respect to those chosen by the people of the largest political subdivision in Hawaii, the City and County of Honolulu.[2] In 1955, when Hawaii was still a Territory, the Legislature took the unprecedented step of delegating to the people of Oahu a central role in formulating "the organic law of the city and county." Hawaii Sen. Standing Comm. Rep. No. 696-55, *reprinted in* 1955 Hawaii Sen. J. 660. A commission was formed to draft a proposed charter for submission to the voters, Act of June 7, 1955, ch. 225, 1955 Hawaii Sess. L. 200, and, on June 14, 1958, a proposed charter was approved by the electorate. Pursuant to the terms of the Charter Commission Act, the approved proposal was submitted to the Legislature, and, with minor modifications, ratified and "enacted as law." Act of June 5, 1959 Hawaii Sess. L. 233, 234. Under the Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), the charter "continue[d] in force" upon statehood several months later.

Hawaii expresses its views as *amicus curiae, see* Sup. Ct. R. 36.4, out of concern that this case is an inappropriate one for resolving whether the language employed by Congress in the Three-Judge Court Act of 1976, Pub. L. No. 94-381, 90 Stat. 1119 (1976), *codified in relevant part at* 28 U.S.C. § 2403(b) (1982), encompasses the charter provisions at issue here. *Compare Erzoznik v. City of Jacksonville*, 422 U.S. 205, 207 n.2 (1975) (local law is a "state statute" under 28 U.S.C. § 1257(2)), *with Board of Regents v. New Left Educ. Project*, 404 U.S. 541, 543 (1972) ("statute" under old Three-Judge Court Act " 'does not encompass local ordinances' " (citation omitted)). Absent a certification order, the Attorney General assumes the Court shares this concern.

[2] Oahu, where the capital, Honolulu, is located, is by far the most densely populated of the Hawaiian Islands. *See Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321, 2325 (1984).

As originally passed by the voters, and ratified by the Legislature, the charter made no provision for recall of elected officials. The nine elected councilmen could be removed "for malfeasance, misfeasance, or nonfeasance in office," and only by the Supreme Court of Hawaii sitting as a board of impeachment. City and County of Honolulu Charter § 3-107 (1959), *reprinted in* Rev. L. Hawaii Appendix 8 at 995 (Supp. 1963). If a council member were impeached and removed, and more than a year remained in her term, a special election was to be held and the voters were to "elect a successor to fill the vacancy for the remainder of the term." *Id.* § 3-105(b), *reprinted in* Rev. L. Hawaii Appendix 8 at 994 (Supp. 1963). The charter provided that any such election would be "conducted in accordance with the election laws of the [State] insofar as applicable[.]" *Id.* §. 12-113, *reprinted in* Rev. L. Hawaii Appendix 8 at 1023.

At the general election of November 7, 1972, the citizens of Honolulu amended the charter to provide for removal of council members by recall by the electorate as well as by impeachment. Charter of the City and County of Honolulu § 11-102, *reprinted in* Hawaii Rev. Stat. ch. 70 App. (Supp. 1974), *recodified at* revised Charter of the City and County of Honolulu § 12-102 (1983 ed.), *reprinted in* App. to Juris. Stmnt. 35. The 1972 charter revisions also provided that "[n]o person who has been removed from his elected office [by recall or impeachment] shall be eligible for election or appointment to any office of the city within two years after his removal[.]" Charter of the City and County of Honolulu § 11-103, *reprinted in* Hawaii Rev. Stat. ch. 70 App. (Supp. 1974), *recodified at* Revised Charter of the City and County of Honolulu

§ 12-103 (1983 ed.), *reprinted in* App. to Juris. Stmnt. 35. The original 1959 provisions for the filling of vacancies created by impeachment were also made applicable to vacancies created by recall. Revised Charter of the City and County of Honolulu § 3-105(b), *reprinted in* App. to Juris. Stmnt. 34.

Under Hawaii law, state officials play critical roles in the recall process. Under Hawaii Rev. Stat. § 11-2 (1976), the Lieutenant Governor is designated the State's "chief election officer" and is charged with the duty of supervising elections at the state or county level. The Supreme Court of Hawaii may exercise its original jurisdiction to rule on the outcome of a close recall vote. *See Republican Party of Hawaii v. Waihee*, 709 P.2d 980, 981 (Hawaii 1985). The court may also issue mandamus relief to compel an election officer to order a disqualified candidate's name "stricken from the ballot" under Hawaii Rev. Stat. § 11-117(b) (Supp. 1984). *See Mink v. Pua*, 711 P.2d 723, 724 (Hawaii 1985).

Because the instant appeal seeks to invalidate the procedure for recall and succession adopted by the voters of the City and County of Honolulu pursuant to a charter process authorized by State law, as well as vital decisions of the Supreme Court of Hawaii implementing the recall process, the State of Hawaii has a compelling interest in this case.

OPINION BELOW

The opinion of the Supreme Court of Hawaii, *Mink v. Pua*, No. 10998, is reported at 711 P.2d 723 (Hawaii 1985).

JURISDICTION

The judgment appealed from was entered November 26, 1985, *see* Order Granting Writ of Mandamus, *Mink v. Pua*, No.10998 (Hawaii Nov. 26, 1985), App. to Juris. Stmnt. 16. Notice of appeal was filed November 27, 1985. App. to Juris. Stmnt. 19. Although jurisdiction in this Court is alleged to have been conferred by 28 U.S.C. § 1257(2) (1982), Juris. Stmnt. 3, the Court may lack jurisdiction by virtue of the filing, within the time allowed by Hawaii R. App. P. 40 (1984) for a motion for reconsideration, of a "Motion for Clarification of Decision" on November 27, 1985, and the lack of a new notice of appeal. *See F.C.C. v. League of Women Voters,* 104 S. Ct. 3106, 3114 n.10 (1984); *F.T.C. v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-12 (1952); *infra* p. 8.

STATEMENT OF THE CASE

On October 5, 1985, George Akahane, Toraki Matsumoto, and Rudy Pacarro, three members of the Honolulu city council, were recalled from office pursuant to the provisions of the Charter of the City and County of Honolulu. Before their election as Democrats in 1982, the three recalled councilmen had pledged in writing to uphold the principles of the Democratic Party of Hawaii.[3] Perhaps sensing change

---

[3] The written pledge filed by each of the councilmen with the office of the city clerk stated:

> I, _____, certify that I will qualify under the law for the office which I am seeking. I further certify that I, the candidate named herein, am a member of the Democrat Party, that I believe in the principles and policies of the

in the political winds, however,[4] the three councilmen in the spring of 1985 formally switched their party affiliation to the Republican Party. It is conceded that the former Democrats' decisions to break their pledge of party loyalty precipitated their recall.

Because of the two-year ban on a recalled council member's holding any city office, the city clerk, Raymond Pua, in performing his duties under the election laws, refused to include the names of the recalled council members on the ballot for the special election called by the city council to fill the vacancies created by the recall election. In a pending federal action, *Matsumoto v. Pua*, No. 85-0950 (D. Hawaii filed August 12, 1985), Akahane, Matsumoto, and Pacarro moved for preliminary relief declaring section 12-103's two-year ban, on which Pua relied, was unconstitutional.

The District Court, sitting en banc, denied preliminary relief, suggesting the recalled councilmen lacked

---

> said Party, and that, if elected, I will, to the best of my ability, seek to carry out the provisions and pledges of the political platform of said Party, and will abide by said Party's rules and regulations.

Honolulu Star Bulletin & Advertiser at E2, col. 1-2 (Sept. 29, 1985).

[4] In the 1984 Presidential election returns for the City and County of Honolulu, President Reagan captured 56 percent of the popular vote, far exceeding his percentage in each of the other three counties of Hawaii. State of Hawaii Data Book 251 (1985). The Republican candidate for mayor received 52 percent of the vote, *id.* at 250, while the Republican candidate for county prosecutor received 73 percent of the vote, *see* State of Hawaii, Results of Votes Cast: General Election, Tuesday, November 6, 1984 at 27.5 (1985).

standing to challenge the two-year ban because (1) "[u]nder any test, a prohibition against a recalled office holder standing for election to fill the vacancy created by his recall would not violate any provision of the United States Constitution[,]" Decision and Order at 3, *Matsumoto v. Pua*, No. 85-0950 (D. Hawaii Oct. 15, 1985); (2) a state court might hold the ousted members ineligible to run in the special election even if the two-year ban were repealed, *id.* at 4; and (3) the defeated councilmen had limited their claim "to the alleged right to be candidates to succeed themselves," *id.* at 5.

On October 28, 1985, the Ninth Circuit reversed. *Matsumoto v. Pua*, 775 F.2d 1393 (9th Cir. 1985). The court resolved the standing issue by noting Pua acted solely on the basis of the two year ban, and had "expressed no view as to whether any other provision of the charter would ban such participation." *Id.* at 1396. The court also rejected the District Court's construction of the claims below, finding claims that the two-year ban would prohibit the recalled members from running not only in the special election, but also in the 1986 general elections, presented a ripe controversy. Refusing to address "the constitutionality of a limited ban against recalled office holders running to fill the vacancies created by their own recall," *id.* at 1397, the court found the ex-councilmen would likely prevail on their attack on a two-year ban, and ordered relief accordingly, *id.* at 1397-98.

On November 20, 1985, two Democratic council members, Patsy Mink and Marilyn Bornhorst, commenced proceedings in the Supreme Court of Hawaii to resolve the issue left open by the Ninth Circuit by

mandamus relief holding Matsumoto and Pacarro "ineligible to fill by special election the unexpired portions of terms from which they were recalled." Emergency Petition for Writ of Mandamus at 2, *Mink v. Pua*, No. 10998 (Hawaii Nov. 20, 1985). Mink and Bornhorst also moved for *ex parte* relief, but that motion was denied, Order Denying Motion for a Temporary Restraining Order, *Mink v. Pua*, No. 10998 (Hawaii Nov. 20, 1985), and the court set the case for expedited briefing and argument. Order For Issuance of Summons, *Mink v. Pua*, No. 10998 (Hawaii Nov. 20, 1985). Respondents below, (Matsumoto, Pacarro, and Pua) were all duly served with notice of the hearing by 9:22 a.m. on November 21, and, on November 25, 1986, the Republican Party of Hawaii was permitted to intervene, Order Granting Motion to Intervene, *Mink v. Pua*, No. 10998 (Hawaii Nov. 25, 1985).

Following argument on November 26, the Supreme Court of Hawaii ordered Matsumoto and Pacarro disqualified from running in the special election scheduled for November 30, 1985, and required Pua to "take appropriate action with respect to said disqualifications." Order Granting Writ of Mandamus, *Mink v. Pua*, No. 10998 (Nov. 26, 1985). Appellants here filed their notice of appeal on November 27, 1985, at 4:21 p.m. Minutes later Pua moved for "clarification" of the court's November 26 decision, in part because the court had overlooked Hawaii Rev. Stat. § 11-118 (Supp. 1984), which entitled the Republican Party to name substitute candidates. Motion for Clarification at 3, *Mink v. Pua*, No. 10988 (Hawaii Nov. 27, 1985). Simultaneously, appellants requested Jus-

tice Rehnquist, as Circuit Justice, to stay the court's November 26 order.

Although urged to let the election go forward, after argument on November 29 the court moved the election to December 28. Order on Motion for Clarification, *Mink v. Pua*, No. 10998 (Hawaii Nov. 29, 1985). That same day, Justice Rehnquist denied the application for stay, *Republican Party of Hawaii v. Mink*, 106 S.Ct. 422 (1985), noting that a construction of the city charter "which prevents Matsumoto and Paccaro from appearing on the ballot" was not "clearly unconstitutional." *Id.* On December 4, 1985, the Supreme Court of Hawaii filed an opinion explaining its November 26 order. *Mink v. Pua*, 711 P.2d 723 (Hawaii 1985). Appellants neither filed a new notice of appeal, nor moved for reconsideration under Hawaii R. App. P. 40 (1984).

ARGUMENT

This appeal should be dismissed. First, appellants' points of error do not present any substantial federal question. Second, and just as important, appellants' claims are riddled with procedural defects.

I. The Appeal Presents No Substantial Federal Question.

It is well settled that the states "have a legitimate interest in ensuring that governmental processes are not disrupted by vacancies and have wide latitude in devising a method to fill those vacancies promptly." *Lynch v. Illinois State Board of Elections*, 682 F.2d 93, 97 (7th Cir. 1982) (citing *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982)). As the Supreme Court of Hawaii noted, permitting a recalled member

to run in the special election required by law within sixty days of recall would risk delaying ad infinitum the process of filling a vacancy since a recalled member could be re-elected by a plurality only to be recalled again by a majority "several times during the second and third years of a councilman's four-year term." *Mink v. Pua*, 711 P.2d at 726. In the words of the United States District Court, "[u]nder any test, a prohibition against a recalled office holder standing for election to fill the vacancy created by his recall would not violate any provision of the United States Constitution[,]" Decision and Order at 3, *Matsumoto v. Pua*, No. 85-0950 (D. Hawaii Oct. 15, 1985), *rev'd on other grounds*, 775 F.2d 1393 (9th Cir. 1985).

Indeed, eight members of this Court have explicitly endorsed the view that the states may enact "restrictions on candidate eligibility that serve legitimate state goals which are unrelated to First Amendment values." *Anderson v. Celebrezze*, 460 U.S. 780, 789 n.9 (1983) (Stevens, J., joined by Burger, C.J., Brennan, Marshall, and Blackmun, JJ.) (citing *Clements v. Fashing*, 457 U.S. 957 (1982) (Burger, C.J., Powell, Rehnquist, Stevens, and O'Connor, JJ., in the majority)). Surely it is legitimate, and unrelated to First Amendment values, for a state to provide reasonable incentives to ensure "a legislator will vote with due regard to the views of his constituents." *Clements*, 457 U.S. at 968 (plurality opinion). As Justice Stevens aptly stated in his concurring opinion in *Clements*, there is no federal interest "in requiring a State to define the benefits and burdens of different elective state offices in any particular manner." 457 U.S. at 974.

Here the people of the City and County of Honolulu have done nothing more than impose a reasonable "burden," *id.*, on the office of city councilman designed to ensure that the elected holder of that office "will vote with due regard to the views of his constitutents." 457 U.S. at 968 (plurality opinion): Those who so defy their constituents that they are recalled by majority vote are disabled from running in the special election to fill the vacancy created by their own inattention to constituents concerns. *See Mink v. Pua*, 711 P.2d at 726.

No serious claim can be made that preventing the three individuals recalled for their party switch from running in the special election discriminated "against those candidates and . . . against those voters whose political preferences lie outside the existing political parties." *Anderson v. Celebrezze*, 460 U.S. at 794. None of the three ex-councilmen sought to run as independents. Rather, they wished to run as *Republicans*.[5] Even if one makes the patently absurd assumption that the Republican Party, which captured fifty-six percent of the 1984 Oahu vote for President, fifty-two percent of the 1984 vote for mayor of Honolulu, and seventy-three percent of the 1984 vote for Honolulu county prosecutor, "is a minor party in Hawaii," Juris. Stmnt. at 4, that party, on the basis of Pua's post-judgment motion, was allowed ample time to field candidates in the special election. Order for Motion for Clarification, *Mink v. Pua*, No. 10998 (Ha-

---

[5] Appellant Republican Party of Hawaii acknowledged Pacarro's and Matsumoto's Republican candidacies in demanding the right to name alternative candidates under Hawaii Rev. Stat. § 11-118. *See* Memorandum in Support of Motion to Intervene at 2, *Mink v. Pua*, No. 10998 (Hawaii Nov. 25, 1985).

waii Nov. 29, 1985). Given the additional fact that the ballot limitation here has nothing to do with "a nationwide electoral process[,]" *Anderson v. Celebrezze*, 460 U.S. at 785, it is obvious no First Amendment interests have been abridged. Appellants' substantive constitutional claims[6] are without merit.

II The Appeal is Riddled With Procedural Defects.

Contrary to appellants' assertion that the claims here are presented "in as pure and clean a factual and procedural context as possible," Juris. Stmnt. at 23, the instant appeal suffers numerous defects.

First, the notice of appeal became a nullity when appellee Pua moved for modification of the state court's November 26 order. Under this Court's decisions, the time in which appeal must be taken "run[s] anew," *F.T.C. v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-12 (1952), when a lower court "changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered[,]" *id.* at 211. Even the *filing* of a timely motion for rehearing requires a new notice of appeal. *Ohio Public Service Co. v. Ohio ex rel. Fritz*, 274 U.S. 12, 13 (1927). Here the state court, in response to a "Motion for Clarification" filed within the time for reconsideration under

---

[6] Appellants' procedural objections, which rely on *Blinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930), are equally groundless. The petition for mandamus below specified the relief sought—disqualification of Matsumoto and Pacarro—and the relief granted did not exceed that demanded. Appellants had a full opportunity to litigate the relief requested. That is all *Brinkerhoff* requires. *Id.* at 681. To credit the procedural claims, even if factually true, this Court would have to hold state courts constitutionally disabled from disposing a case on a ground not raised by the parties. *But see Engle v. Isaac*, 456 U.S. 107, 135 n.44 (1982).

Hawaii R. App. P. 40 (1984), materially altered the rights of appellant Republican Party of Hawaii to field candidates in the special election. *Cf. F.C.C. v. League of Women Voters*, 104 S. Ct. 3106, 3114 n.10 (1984) (appeal is timely if postjudgment motion is directed to a "wholly collateral issue"). The "policy that statutes authorizing appeals [to this Court] are to be strictly construed," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 & n.10 (1984), requires dismissal of the appeal.[7]

Second, insofar as state law would require any council vacancy occurring this late in the term to be filled by appointment, not by special election, *see* Order on Motion for Clarification, *Mink v. Pua*, No. 10998 (Hawaii Nov. 29, 1985),[8] no effective remedy could be given, even if this Court enjoyed the power, *but see Mills v. Green*, 159 U.S. 651 (1895), to void the election that ultimately occurred on December 28, 1985. Even appellants thus recognize that to escape the conclusion that this case "is classically 'moot[,]' " *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 71 (1984) (per curiam), they must shoehorn their

---

[7] Thus, even if the Court would apply the old rule for appeals under 28 U.S.C. § 1291, *see Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982) (per curiam), to cases under the exception to this policy, 28 U.S.C. § 1252 (1982), dismissal would still be warranted. *F.C.C. v. League of Women Voters*, 104 S. Ct. 3106 (1984), however, suggests a premature notice filed even in a § 1252 case would be rendered void by filing of a timely motion for amendment of judgment on a "non-collateral" issue. *See id.* at 3114 n.10. If this is so, dismissal is required a fortiori. *See Silkwood*, 464 U.S. at 247-48 & n.10.

[8] That appointment would be made by the remaining council majority, *see* App. to Juris. Stmnt. 33, which is controlled by the Democratic Party, Juris. Stmnt. 5.

claims into the exception for cases " 'capable of repetition, yet evading review[,]' " Juris. Stmnt. at 22 (citation omitted).

Appellants cannot accomplish this feat. This Court has repeatedly held that to come within the exception "there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). A "mere physical or theoretical possibility [of repetition,]" *id.* is not sufficient. In order for the "same controversy" to be repeated, appellants must make the farfetched assumption that Pacarro and Matsumoto will again run in a general election, will win again, will again switch parties, and will again be recalled.[9] Even if proving mootness is appellees' burden, *Firefighters v. Stotts*, 104 S. Ct. 2576, 2583 (1984), that burden has been carried. For switching parties in the middle of a term, Matsumoto and Pacarro were ousted from office. "It is not likely that the parties to this dispute will forget this lesson." *Jefferson v. Abrams*, 747 F.2d 94, 97 (2d Cir. 1984). There is "no reason to believe," *Murphy*, 455 U.S. at 458, that "the questions before the Court are certain to be central to future proceedings[.]" *National Ass'n of Greeting Card Publishers v. United States Postal Serv.*, 462 U.S. 810, 820 n.14 (1983).

---

[9] This position and Justice Padgett's analysis of the reasons for the ineligibility of recalled council members for the special election, *Mink v. Pua*, 711 P.2d at 726, are thus consistent. To the extent the factual predicates for a justiciable controvesy are at all present, however, Justice Padgett's view of the merits is even more compelling.

Third, appellants failed to raise many if not all of their constitutional claims in the state court, notwithstanding that a motion for reconsideration under Hawaii R. App. P. 40 provided an avenue for doing so.[10] As was noted recently, "the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review[,]" *Heath v. Alabama*, 106 S. Ct. 433, 437 (1985). Because failure to raise claims by means of a Rule 40 motion bars further litigation in state court, *Robinson v. Ariyoshi*, 65 Hawaii 641, 662, 658 P.2d 287, 302-03 (1982), the claims raised for the first time in this Court have been forfeited, *Orr v. Orr*, 440 U.S. 268, 275 n.4 (1979)

Finally, whether the state court's decision is preclusive in proceedings in the federal courts is simply not cognizable on this appeal, at least as long as this

---

[10] Rule 40, Hawaii R. App. P. (1984), provides, in pertinent part:

> Rule 40. Motion for Reconsideration.
>
> (a) Time. A motion for reconsideration may be filed by a party only within 10 days after the filing of the opinion or ruling unless by special leave additional time is granted during such period by a judge or justice of the appellate court involved.

Although Matsumoto and Pacarro asserted granting the writ below "would violate the First and Fourteenth amendments of the U.S. Constitution[,]" Memorandum in Support of Motion to Dismiss Emergency Petition 3, *Mink v. Pua*, No. 10998 (Hawaii Nov. 25, 1985), and the state court did rule on that issue, the points raised by the first three "Questions Presented" of the Jurisdictional Statement, which, absent plain error, are the only points at issue here, Sup. Ct. R. 15.1(a), are all addressed to the reasoning of the state court's December 4 opinion. None of *these* issues were raised in state court.

Court's appellate jurisdiction is limited to the "controversies" presented by the case actually on appeal. *Flast v. Cohen*, 392 U.S. 83, 96 (1968); *see Colorado v. Nunez*, 465 U.S. 324, 329 (1984) (Stevens, J., dissenting).[11]

CONCLUSION

Although it may be wise for this Court "to flesh out its holding in *Anderson v. Celebrezze*, 460 U.S. 780 (1983)," Juris. Stmnt. 24, of all the cases on the Court's appellate docket, *see, e.g., Socialist Workers Party v. Washington*, 765 F.2d 1417 (9th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 783 (1986), this one is not the proper vehicle for doing so. The federal questions presented are wholly insubstantial, and the appeal is beset by numerous procedural defects. For these reasons, the State of Hawaii urges that the appeal be dismissed.

---

[11] Although a state court's failure to give preclusive effect to a federal court decision is cognizable in this Court, *cf. Parsons Steel, Inc. v. First Alabama Bank*, 106 S. Ct. 768, 773 (1986) (review by certiorari only), any preclusion claim preserved for review, *see supra* note, is meritless. Given the Ninth Circuit's explicit refusal to rule on the issue decided by the Supreme Court of Hawaii, the predicates for upsetting the judgment here on the basis of *Matsumoto v. Pua*, 775 F.2d 1393 (9th Cir. 1985), do not exist. *See generally Migra v. Warren City School Dist.*, 465 U.S. 75, 77 n.1 (1984).

Respectfully submitted,

JAMES H. DANNENBERG
First Deputy
Attorney General
Counsel of Record

CORINNE K.A. WATANABE
Attorney General
State of Hawaii

STEVEN S. MICHAELS
Deputy Attorney General
State of Hawaii

State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Counsel for the
State of Hawaii